# No. 11,798

IN THE

# United States Circuit Court of Appeals

## For the Ninth Circuit

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PUEBLO TRADING CO. (a corporation),
*Appellant,*

vs.

EL CAMINO IRRIGATION DISTRICT (a public corporation); B. A. OSBORN, S. E. AYER, J. P. BURTON, WALTER MAYES and WALTER BUNTING, Members of the Board of Supervisors of Tehama County, and W. E. ROCHFORD, Assessor of Tehama County, California,
*Appellees.*

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## BRIEF FOR APPELLANT.

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## BRIEF FOR APPELLANT.

### JURISDICTIONAL FACTS AND PLEADINGS.

This is an appeal from an order made by the District Court dismissing contempt proceedings in a civil case and holding that the Court did not have jurisdiction of certain of the appellees herein and that they had not been afforded due process.

The jurisdiction of this Court in this appeal is under Section 128(a) Judicial Code as amended, 28

U.S.C.A. 225(a), and Rule 73, Federal Rules of Civil Procedure. The appellant herein, Pueblo Trading Co., was the plaintiff below and obtained a judgment for a sum of money upon bonds of the El Camino Irrigation District, a public corporation. This being a case where a writ of execution could not issue, the judgment provided for payment by ordinary tax process. The officers whose duty it was to carry out the tax process had not been made parties to the action. The judgment provided that they should satisfy the judgment and the Court retained jurisdiction of the cause for that purpose. After notification to them of the requirements of the judgment and their failure to carry out the Court's order they were cited for contempt (R. 12-13), the order to show cause further providing that the parties show cause why "such further order in the premises should not be made as will insure the levy and collection of assessments for the satisfaction of the judgment herein." The appellees appeared by demurrer (R. 18) and the Court after a hearing issued its order dismissing the proceedings. (R. 27.) This order from which the appeal was taken was dated September 23, 1947, and filed September 23, 1947. (R. 29.) Notice of appeal was dated October 28, 1947 and filed November 3, 1947 (R. 29), and the appeal was filed in this Court on November 24, 1947. (R. 33.)

The amount in dispute is the sum of $53,000 (R. 7), exclusive of interest.

## STATEMENT OF THE CASE.

Pueblo Trading Co., a Nevada corporation, brought suit against the El Camino Irrigation District, located in Tehama County, California in January, 1945, and in its complaint stated that the El Camino Irrigation District is a public corporation, an irrigation district, organized and existing under the provisions by virtue of "the California Irrigation District Act" of the State of California, being Stats. 1897, page 254 as amended.[1] The irrigation district had previously sold its general obligation coupon bonds in the principal amount of $430,000 or thereabouts, bearing interest at six per cent per annum, and the plaintiff was the owner of $53,000 principal amount of these bonds, together with certain interest coupons and interests appurtenant thereto. The appellant alleged that these bonds were wholly unpaid and prayed for judgment against the defendant for the sum of $53,000 principal, together with interest, and for such other relief as might be proper. (R. 2-5.) The complaint was served upon the El Camino Irrigation District on January 10, 1945 (R. 6), which defaulted in the action, whereupon a judgment was entered by the Court on February 13, 1945. (R. 8.) This judgment awarded plaintiff the sum of $53,000 principal, $18,-181.65 interest and $19.00 costs, together with future interest (R. 7) and the judgment contained the further provision: "It is further ordered that the defendant El Camino Irrigation District make provision

[1]This act has now been incorporated into the Water Code, where it is Division 11.

for the payment of this judgment by levying and collecting assessments against the lands in said irrigation district in the manner provided under the provisions of Division 11 of the Water Code of the State of California, and that upon the failure or refusal of the defendant and its officers to make such provision, that the Board of Supervisors and other officers of the County of Tehama, State of California, make provision for the payment of this judgment by levying and collecting assessments against the lands in said district in the manner provided by the said Division 11 of the Water Code of the State of California, and that for that purpose this Court retain jurisdiction of the cause and that the plaintiff may apply to the Court for such further relief as may be appropriate to obtain satisfaction of the judgment." (R. 7.)

This provision is at the center of the controversy.

Copies of the judgment were served upon the directors of the El Camino Irrigation District August 28, 1946 and September 27, 1946. (R. 9, 11.)

Certified copies of the judgment were also served upon the District Attorney of Tehama County and the Assessor of Tehama County (W. E. Rochford, appellee), on September 5, 1946; also upon the Treasurer of Tehama County on September 12, 1946. (R. 10.)

Service of the judgment was also made upon the members of the Board of Supervisors of Tehama County, appellees herein, that is, upon board mem-

bers B. A. Osborn, S. E Ayer, J. P. Burton, Walter Mayes and upon G. L. Childs, then board member on August 28, 1946. (R. 11.)

A written notice and demand was also made advising the Board of Supervisors of Tehama County of the failure of the irrigation district to levy assessments for the purpose of satisfying the judgment and calling their attention to the fact that certified copies of the judgment had been served upon the Board of Supervisors, and demanding that the board forthwith levy an assessment as provided in the judgment for the purpose of paying the same and advising the board that if the board should continue to fail to make such levy, application would be made to the Federal Court for an order citing for contempt. This notice further advised the board that not only did the judgment require them to do these things but that the laws of California also required them to do so and called the attention of the Board of Supervisors to the fact that the El Camino Irrigation District and its officers had failed for more than 10 years to levy any assessment whatever for bond interest or principal. This notice was dated January 2, 1946 (obvious error, should have been 1947), and the notice was served upon the Board of Supervisors by serving the clerk, the chairman of the board and the majority of the board members and the county assessor and tax collector on January 3 and 4, 1947. (R. 15, 24, 25.)

It is contended that the Board of Supervisors and the assessor, the appellees herein, had due and proper

notice of the judgment and of the requirements placed upon them, and that due process was afforded them.

The pertinent provision of the Water Code of the State of California requiring the Board of Supervisors to make the levy in question is Section 26,500 of the Water Code, which provides as follows:

> "If a board neglects or refuses in any year to levy assessments pursuant to this part, the board of supervisors of the office county shall, as provided in this article, perform the duties of the board of the district in respect to levying assessments in the same manner and with the same effect as if they were performed by the board."

The matter of the failure of the Board of Supervisors to carry out the provisions of the judgment and of the statute was called to the attention of the Court by affidavit filed in the case July 7, 1947 (R. 16), whereupon the Court on July 7, 1947, issued its order to show cause directed to the Board of Supervisors and the assessor, appellees herein, to show cause on August 18, 1947, why they should not be punished for contempt for disobedience of the judgment made February 13, 1947, and why such further order in the premises should not be made "as will insure the levy and collection of assessments for the satisfaction of the judgment herein." (R. 12.)

This order was served upon the parties August 13, 1947. (R. 13.)

The appellees appeared by demurrer to the affidavit for the order to show cause (R. 18) and contended (1): That the judgment went beyond the complaint;

(2): That the appellees were not made parties to the proceedings nor brought before the Court by any process; (3): That the appellant had not pursued the remedies provided by Sections 26,550 to 26,553 of the Water Code of the State of California.[2]

Appearance was also made by affidavit in opposition to the order to show cause in which the District Attorney of the county relied upon the demurrer and the advice of the Attorney General of the State of California set forth at R. 21-23.

By the affidavit the appellees also made the defense that it would be inequitable to levy an assessment for the appellant's judgment "when as a matter of fact there are other outstanding bonds and interest on bonds in a far greater sum than is involved in this suit."

The defense was also made in this pleading that the California Court had held in the case of *El Camino Land Corporation v. Board of Supervisors of Tehama County,* 43 C. A. (2d) 351, that "writs of mandate were denied solely because to have enacted the assessments would have produced economic chaos and would have been inequitable." (R. 19-20.)

The opinion of the Attorney General addressed to the county tax collector (R. 21), was dated September 23, 1946, and showed that the matter of the assessment had been discussed and he advised the officials that *because of the fact that they were not notified of the judgment until after they had fixed*

[2]These sections are set forth in Appendix A attached hereto.

*their tax rate the county would not be guilty of contempt* (R. 22), but urged the Board of Supervisors and the officials to take the matter up with the board of directors of the irrigation district and try to get them to work out a solution to their financial difficulties "because it is quite possible that, in proper proceedings, the county could be compelled to levy and collect an assessment to discharge such obligations." (R. 23.)

The matter came on for hearing before the Court, which made its order dismissing the proceedings entirely on September 23, 1947. (R. 29.) The Court in this order held that the case of *Board of Supervisors of Riverside County v. Thompson,* 122 Fed. 860, is distinguishable from the case at bar, saying: "There a money judgment had been obtained in a prior action against an irrigation district and the judgment remained unsatisfied. The judgment creditor brought a second action seeking a mandate requiring the Board of Supervisors to make a levy sufficient to satisfy the judgment. In the second action the Board of Supervisors was afforded due process. The members of the board were parties to that action. They could there present any available legal defense." (R. 28.)

We will show in our argument that there is a misunderstanding as to what occurred in the *Thompson* case, and that the case is not distinguishable.

The Court below held that to hold the officers for contempt they would have to be afforded notice and an opportunity to be heard "before this Court would

have jurisdiction to render a judgment requiring members thereof to perform their statutory duty and for the failure to perform which the contempt is sought. Until that time they would not have been afforded their constitutional guarantee of 'due process' " and the Court held that "the Board of Supervisors not being parties to this action, this Court had no jurisdiction over them, * * *." (R. 28, 29.) The proceedings were thereupon dismissed.

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## SUMMARY OF ARGUMENT.

Writs of mandamus have been abolished in federal procedure. There is no such thing as bringing an action for a writ of mandamus. Under the federal rules where a judgment is not to be satisfied by execution, the judgment should provide the method by which it is to be satisfied. The collection of a judgment by whatever method is merely process in the nature of execution. The order requiring the supervisors to make the assessment was no different in character than a writ of execution would have been requiring them to make payment. It is no more necessary to make the officers who have a duty to perform parties to an action against a public corporation than it is necessary to make the marshal or any other person who has a duty to perform a party to the action. Furthermore, these officers were all afforded due notice and process. Months and even years passed before they were brought in before the Court below. They were there-

for guilty of contempt. Furthermore, the *Thompson* case is not distinguishable as we will show in our subsequent analysis. The supervisors in that case were not made parties to the action by the plaintiff and the case holds that they were not necessary parties. Furthermore, the Court below erred because the order to show cause provided that the Court would proceed with whatever was proper to effect a levy of the tax. If the Court was properly satisfied that the parties were not guilty of contempt, it should have made an order then and there requiring the levy of the assessment.

Arguments are made under First Point, Second Point and Third Point because the additional defenses there discussed were made. They are not included in this summary.

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## ARGUMENT.

### FIRST POINT: THE DEFENSE THAT IT WAS NECESSARY FOR THE APPELLANT TO SEEK THE REMEDY PROVIDED IN SECTIONS 26550-26553 INCLUSIVE OF THE WATER CODE OF THE STATE OF CALIFORNIA WAS NOT SUSTAINED.

The provisions are set forth in full in Appendix A hereunto annexed.

The sections quoted impose upon the District Attorney the duty of notifying the Board of Supervisors of the failure of the board of directors of the irrigation district to levy the assessments, and if the Board of Supervisors fail, then to take action to compel performance. If the District Attorney fails to carry

this out, it becomes the duty of the Attorney General of the State to compel the levy.

It seems a strange thing that the officers of the County of Tehama should plead their own negligence and neglect as the reason for not performing the order of the Court. After all, what plaintiff seeks is performance of the duty which the District Attorney and the Attorney General should have enforced.

In the case of *Selby v. Oakdale Irrigation District,* 140 C. A. 171, 35 Pac. (2d) 125, the intervener raised this very point. The case involved an application for a writ of mandamus to require the treasurer of the district to pay bond interest and principal due. Counsel for the intervener contended that petitioner had failed to pursue the proper remedy for the enforcement of his right and said:

> "Your petitioner could
>
> 1. Have made a demand on the Board of Directors for a levy of a tax to provide for the payment of his bonds and coupons;
>
> 2. In the event that the Board of Directors should refuse to levy a tax as requested, demand that the District Attorney of the county in which the District is located request the Board of Supervisors of that county to provide for the tax (Irrigation District Act, Section 39c);
>
> 3. In the event that the District Attorney and the Board of Supervisors should fail to perform their duties as provided by law, request the Attorney General of the State of California to take such measures as may be necessary to enforce the

performance of the duties relating to the levying and collection of assessments (Irrigation District Act, Section 39c);

4. And, lastly, in the event that any of the aforementioned remedies should have proved ineffectual, your petitioner had the right to apply to an appropriate court of law, seeking a writ of mandate to require the respective officers and officials of the Oakdale Irrigation District to perform the duties especially enjoined upon them by law."

The District Court of Appeal answered this contention in the following language (page 128):

"A reading of the record discloses that the board of directors of the Oakdale Irrigation District, the board of supervisors of the county of Stanislaus, in which said district is situated, and also that the district attorney of said county, have failed and neglected to comply with the provisions of Section 39 (amended by St. 1931, p. 122); sections 39b and 39c (St. 1917, pp. 765, 766), of the California Irrigation District Act, and that the treasurer of Stanislaus County has failed and refused to comply with the provisions of section 52 of said act. In these particulars it is urged by the interveners that the petitioner should have instituted mandamus proceedings against the respective officers to compel performance of their statutory duties, and especially should have prosecuted an action against the directors of the district to compel them to levy a tax for the benefit of holders of unrefunded bonds.

"We may admit that the petitioner might have maintained such a proceeding against the board

> of directors immediately after September 27, 1933. This admission, however, does not lead to the conclusion that any unauthorized limitation of the purposes of the tax levy, or any unauthorized attempted preference is thereby conceded to be valid, or that such portion of the attempted levy is legally any part or parcel thereof."

The defense was accordingly overruled and the writ sought by Selby was granted.

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**SECOND POINT: CALIFORNIA LAW AS INTERPRETED IN THE CASE OF EL CAMINO LAND CORPORATION v. BOARD OF SUPERVISORS OF TEHAMA COUNTY, 43 CAL. APP. (2d) 351, 110 P. (2d) 1076, DOES NOT SUPPORT THE ORDER OF THE DISTRICT COURT IN DISMISSING THE PROCEEDINGS.**

Appellees relied upon the case of *El Camino Land Corporation v. Board of Supervisors of Tehama County,* 43 Cal. App. (2d) 351, 110 Pac. (2d) 1076, as a ground for refusing a levy of an assessment for the judgment in this case.

This case merely held that the issuance of a writ of mandamus is discretionary with the Court. The Court said (page 1079):

> "We are of the opinion that under the law as we have stated it, the facts found by the court were sufficient to invoke its legal discretion in favor of denying the writ."

In the instant case the Court did not exercise its discretion in such manner in entering the judgment and furthermore it is not certain that it could have

so done. This is a matter of procedural law. At any rate the defendant appellee had ample opportunity to appear before the Court and plead its cause. This it did not do.

Counsel for the appellees referred in their response to the order to show cause to a letter from the then Attorney General dated September 23, 1946 in which the former Attorney General gave it as his opinion that the judgment in this case went beyond the prayer and that because the judgment was not called to the attention of the county until after fixing the tax rate the county could not in any way be held guilty of contempt. The attorney general also cited the *El Camino* case.

It might be pointed out also that the Attorney General recommended to the county officials that they urge the board of directors of the irrigation district to try to work out a solution of its financial difficulties. It is obvious that the district has made no attempt to do this and it has levied no assessments of any kind for bonds for over ten years. However, that matter is outside the purview of the present proceeding. The *El Camino* case, also referred to by the Attorney General, cannot be considered after the judgment requiring the levy has become final and the period fixed in Rule 60 of the Federal Rules of Civil Procedure has expired.

THIRD POINT: THE DEFENSE THAT THE JUDGMENTS WERE SERVED ON THE SUPERVISORS TOO LATE TO MAKE A LEVY WAS NOT SUSTAINED.

As to the Attorney General's claim that it was too late to make the levy when the judgments were served because the county levy had already been made, the facts as shown by the record are that the judgment was entered in this case on February 13, 1946; that certified copies of the judgment were served upon all the parties to this proceeding in September, 1946; that a further notice was served upon the supervisors and officers of the county in January, 1947. If it was too late to include these assessments when the taxes were levied by the county in 1946, it was not too late to do so in 1947. The county made no offer or promise to levy in 1947 but still resisted the order of the Court requiring the levy of an assessment.

Furthermore, Sections 26500 to 26504[3] of the Water Code do not contemplate the Board of Supervisors shall levy the assessment at the same time or in the same manner as they levy the county assessment. Section 26500 provides that the supervisors shall levy the assessment "in the same manner and with the same effect as if they were performed by the board". Section 26501 provides that the applicable part of the equalized county assessment roll shall be the basis of the assessment. This therefore contemplates that the assessment should be made after the county has made its own assessment and equalized its rolls, for in Section 26502 it says that if any land subject to assess-

[3]See Appendix A.

ment for the purpose of the district does not appear upon the county assessment roll used as the basis for the district, the board shall be forthwith required to meet and equalize the assessment made for the irrigation district in a separate proceeding.

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**FOURTH POINT: THE JUDGMENT REQUIRING THE SUPERVISORS AND ASSESSOR TO LEVY ASSESSMENT TO SATISFY THE JUDGMENT WAS IN THE NATURE OF EXECUTION OF THE JUDGMENT, AND THE OFFICERS INVOLVED WERE NOT NECESSARY PARTIES TO THE ACTION, MERELY BECAUSE THE SATISFACTION OF THE JUDGMENT MIGHT REQUIRE THEIR ACTION.**

No writ of execution can be levied against the property of an irrigation district. (*El Camino Irrigation District v. El Camino Land Corp.,* 12 Cal. (2d) 378, 85 Pac. (2d) 123.

In federal Courts the former practice was to obtain a judgment against the district and then to obtain a writ of mandate to compel levy of assessment. Under the former practice these writs of mandate were obtained in supplemental proceedings. (*Thompson v. Perris Irrigation District,* 116 Fed. 769; *Board of Supervisors of Riverside County v. Thompson,* 122 Fed. 860.[4])

As stated in those two decisions, mandamus is a proper remedy for collecting a judgment against an irrigation district in California.

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[4]Another case in this litigation is *Perris Irrigation District v. Thompson,* 116 Fed. 832.

*The writ was not a new suit but merely process essential to jurisdiction and substituted for execution to enforce the judgment.* Furthermore, it was held in *Riverside County* case that the judgment determined all questions that might have been litigated and also all questions that were actually litigated, and determined those matters for the parties, not only before the Court, but for *all parties who might thereafter under the law be called upon in a proceeding in the nature of an execution to enforce the judgment therein obtained.*

The basis for the issuance of the writ of mandate was California Statutes 1897, page 254 (Sec. 39 of the California Irrigation District Act), now Sections 25650 and 25652 of the Water Code, and which provides that the Board of Directors of the irrigation district shall "levy an annual assessment upon the lands within the district in an amount sufficient to raise * * * all obligations of the district which have been reduced to judgment".[5]

Section 26500 of this Code provides that if the Board of Directors neglect or refuse to make the assessment "the board of supervisors of the office county shall * * * perform the duties of the board of the district * * *"

Thus the officers of the county are in effect made officers of the irrigation district to carry out the tax process. (See Appendix A.)

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[5]The bonds appear to have been issued under the former Wright Act, Stat. Cal. 1887, p. 29 (116 Fed. 832, 3).

Now the Federal Rules of Civil Procedure, Rule 81 (b) provide for the abolition of writs of mandate and provide that the relief of a writ of mandate may now be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules. Section 69 of the Rules provides:

> "Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise."

It therefore appears that unless the Court had directed otherwise in the judgment, the plaintiff would have been limited to a writ of execution, and insomuch as writs of mandate have been abolished, it would therefore appear that the Court took the proper course in providing *otherwise* in the judgment, and this it did in providing for the collection of the judgment by the method provided by the Water Code of the State of California, namely, levy of assessment.

In *Board of County Commissioners of Labette Co., Kansas v. U. S.,* 112 U. S. 217, 5 S. Ct. 108, it is held that mandamus can be exercised against persons who are not parties to the judgment sought to be enforced. See also *U. S. v. County Court of Knox Co.,* 122 U. S. 306, 7 S. Ct. 1171, where the Court affirmed the decision in the above case saying:

> "The findings in the judgment on that point are conclusive. They bind the respondents in their official capacity as well as the county itself, * * *"

This last case holds that the Court has jurisdiction to enforce a judgment entered by the Court by man-

damus against persons who are not parties to the judgment sought to be enforced.

In the case of *Stewart v. Salamon,* 97 U. S. 361:

> "This is an appeal from a decree entered upon our mandate. No complaint is made as to its form and it seems to be in all respects according to our directions. *The effort of the appellant was to open the case below, and to obtain leave to file new pleadings, introducing new defenses. This he could not do.* The rights of the parties in the subject matter of the suit were finally determined upon the original appeal, and all that remained for the Circuit Court to do was to enter a decree in accordance with our instructions, and carry it into effect. If in the progress of the execution of the decree, after its entry, either party is aggrieved, he may appeal from the final decree in that behalf; but such an appeal will bring up for re-examination only the proceedings subsequent to the mandate. The appeal is dismissed with costs".

It was contended that the proceeding for the writ was entirely new and independent of the action upon which the judgment was obtained. The case of *Riggs v. Johnson County,* 6 Wall. 166 disposes of this point:

> "The writ of mandamus in the case like the present one is a writ in aid of jurisdiction, which has previously attached, and in such case it is a process ancillary to the judgment, and is the proper substitute for the ordinary process of execution to enforce the payment of the same as provided in the contract. * * * When so employed it is neither a prerogative writ nor a new suit in

> the jurisdictional sense. On the contrary, it is a proceeding ancillary to the judgment which gives the jurisdiction, and when issued becomes a substitute for the ordinary process of execution to enforce the payment of the same."

In *State of Arkansas v. St. Louis-San Francisco Ry. Co.,* 269 U. S. 172, 46 S. Ct. 66, it is held where a judgment was obtained against a county, the district Court had jurisdiction to compel the assessing officers of the county to levy a tax for the purpose of securing satisfaction of this judgment.

The leading case is one in this circuit, *Board of Supervisors of Riverside County v. Thompson,* 122 Fed. 860.[6] In this case a judgment had been obtained against the irrigation district in question and the Court held that this judgment was conclusive as to all matters that might have been litigated in the action, so far as the board of supervisors of the county was concerned, and that the board might be compelled in supplemental proceedings to make the levy by mandamus. The Court, after citing the California statutes, said:

> "By this statute it is made the plain duty of the board of supervisors to make the levy required by the act in case of the neglect or refusal of the board of directors to cause such assessment and levy to be made. But it is objected that the board of supervisors and the interveners were not parties to the former action, and were, therefore,

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[6]See full discussion of this case under separate point, next following.

not precluded by the judgment, and that they now have the right to make herein all the defenses which could have been made to the original action. We cannot assent to this contention. *The judgment in the former action established the right of the defendant in error against the irrigation district. All the necessary parties to that action were before the court, and there was no defect of parties defendant.* The present proceeding is not a new action to establish the rights of the defendant in error as against other parties. It is a proceeding in the nature of an execution to enforce the judgment already rendered. The right of the defendant in error to call upon the board of directors to enforce the judgment was established in that judgment, as well as his right to have recourse to the board of supervisors in case of the refusal or neglect of the board of directors to make the levy and assessment. Neither the board of directors nor the board of supervisors nor the taxpayers of the Perris Irrigation District can be heard to defend the present proceeding on any of the grounds litigated, or which might have been litigated, in the former action.

*"The point is made that no notice or demand was given the board of supervisors before filing the petition for the writ of mandamus. The statute does not require such notice. The petition was notice."* (Emphasis ours.)

FIFTH POINT: THE COURT BELOW ERRED IN CONSTRUING THE DECISION IN THE CASE OF RIVERSIDE COUNTY v. THOMPSON, 122 FED. 860.

The District Judge refers to the case of *Board of Supervisors of Riverside County v. Thompson,* 122 Fed. 860 and says:

> "That case is clearly distinguishable from ours. There a money judgment had been obtained in a prior action against an irrigation district and the judgment remained unsatisfied. The judgment creditor brought a second action seeking a mandate requiring the board of supervisors to make a levy sufficient to satisfy the judgment. In the second action the board of supervisors was afforded due process. The members of the board were parties to that action. They could there present any available legal defense." (R. 28.)

We have examined the record on appeal in this case in the files of the Ninth Circuit Court of Appeals, where the case is numbered 912. We think there is some misunderstanding of the *Thompson* case. There were not two actions but only one. The members of the Board of Supervisors were not made parties to any suit. They asked to intervene. What really happened was that a judgment was obtained against the Perris Irrigation District on the bonds in question. At that time a district Court could issue a writ of mandate. So the plaintiff Thompson asked the Court to issue a writ of mandate and an alternative writ was issued September 18, 1901. (R. 79, case No. 912 in this Court.) Thompson in his brief in this case goes to considerable length to emphasize the fact that there is only one action and not two actions. He emphasizes

that in the lower Court, where all papers bore the number 849. The attorney for Thompson, whom we will refer to as the plaintiff, was Christopher C. Wright. C. B. Bullock was one of the supervisors. Perris Irrigation District was the district involved. Probably the difference in names of the parties has brought confusion not only to the Court when the original case was heard but to the Court below in the instant case. At page 43 of Thompson's brief he contends that the interveners, that is, Bullock and the other parties who intervened, were not proper parties to the proceeding. We think the decision in the case upheld this contention. The defense raised by the Board of Supervisors in their answer was stricken by the lower Court and the judgment of that Court was affirmed. **Consequently it would appear that the Thompson case determines that the Board of Supervisors are not proper parties and did not have the right to litigate the matter after a judgment has been entered against an irrigation district.**

R. H. Thompson brought his action against the Perris Irrigation District. An amended complaint was filed. (R. 10, case No. 912.) The plaintiff asked for a judgment against the district in the amount of $6405 with interest and costs upon certain bonds and coupons which were alleged to have been issued by the district. The case was heard before a jury, and upon instructions of the judge to the jury judgment for $8306.75 was entered March 28, 1901. (R. 25, case No. 912.) The case was then appealed to the Ninth Circuit Court of Appeals and judgment was affirmed May 5, 1902. (R. 90, 91, case No. 912.) Thompson

filed a petition for writ of mandate to compel the supervisors to levy an assessment in the same action. (R. 62, case No. 912.) (See also R. 74.) This petition showed that some kind of a request had been made to the Board of Supervisors to levy the assessment. (R. 67, case No. 912.) In our case like request was made of the Board of Supervisors. The supervisors refused to make the levy. (R. 205, case No. 912.) Whether the petition for mandate was served upon the Board of Supervisors does not appear, but at any rate the defendant Perris Irrigation District made a motion to quash the alternative writ and filed a demurrer to the petition, and a demurrer was also filed by the Board of Supervisors to the petition on or about December 16, 1901. (R. 83, 86, 87, 90, case No. 912.) (Mandate was issued May 21, 1902.)

The motion to quash stated amongst other things: "There is a misjoinder of parties to said petition in that petition for an order to show cause and for a writ of mandate should have been against the Board of Directors of the Perris Irrigation District, defendant in said action, and not against the Board of Supervisors of the County of Riverside, State of California." And upon the further ground that "The Board of Supervisors of Riverside County mentioned in said petition, and to whom the order to show cause herein is directed, is not, nor is any of its members, made a party defendant to said action, or to said petition for a writ of mandate." (R. 84, case No. 912.)

That is exactly the situation in the instant case where an application for an order to show cause was

made by plaintiff Pueblo Trading Co. and an order to show cause issued. (R. 12, 14, 16, case No. 11798.) The application in the instant case prayed for an order to be issued, citing the supervisors to show cause why they should not be punished for contempt, and that such further order be made as would insure provision for payment of the judgment by levy and collection of taxes and assessments on the lands. (R. 15.) The judge below in the instant case in his order dismissed the entire proceeding and granted no relief. (R. 27.)

An order was made in the *Thompson* case denying the motion to quash the mandate on June 11, 1902. (R. 94, case No. 912.) The judge's opinion on this order is quite significant. The judge said, referring to the writ of mandate, "When so employed, the writ is not a new suit but simply a process essential to jurisdiction, and a substitute for execution to enforce the judgment", citing *United States v. Johnson County,* 6 Wall. 193, 18 L. Ed. 775 and *Weber v. Lee County,* 6 Wall. 210, 18 L. Ed. 781. (R. 95.)

*Knox County v. Aspinwall,* 24 Howard 376, 16 L. Ed. 735;

*Mayor v. Lord,* 76 U. S. 409, 19 L. Ed. 704;

*United States v. New Orleans,* 98 U. S. 381, 25 L. Ed. 227;

*United States v. Knox County,* 122 U. S. 306, 30 L. Ed. 1152, 7 S. Ct. 1171;

*Chanute City v. Trader,* 132 U. S. 210, 33 L. Ed. 345, 10 S. Ct. 67;

*Labette County Commrs. v. U. S.,* 112 U. S. 217, 28 L. Ed. 698, 5 S. Ct. 108.

Subsequently the supervisors were permitted to intervene and they filed an answer (R. 124, case No. 912); but the peremptory writ was granted (R. 160, case No. 912), and the judge struck from the answer all the substantial defenses which had been raised. (R. 174, 194, 215, 216, case No. 912.)

On appeal the supervisors contended: "The Board of Supervisors was not a party to the original action to recover on the bonds, nor were the members of the board of directors of that district. There is no allegation in the petition that any notice was given to the board of directors of the Perris Irrigation District of the recovery of any such judgment,". This was urged as a reason for reversal. It was also contended (page 18 of their brief) that the Court erred in striking out all that part of the answer showing that the district was never legally organized and other matter. The supervisors contended that the Court had had no jurisdiction to issue the writ prayed for. (R. 22, case No. 912.) Their conclusion was summed up at page 42 in the following language:

> "We respectfully submit, therefore, that there is no pleading and no proof warranting the issuance of the peremptory writ in this case, and that by striking out the portions of the answer of the intervenors referred to, they were denied their right to make proof upon material and vital questions affecting their property interests, and that therefore the judgment of the court below should be reversed." (Brief, page 42.)

The motion to quash and demurrer were disallowed by the Court. (116 Fed. Rep. 770.) Thomp-

son contended that the Board of Supervisors had no right to contest the proceedings. (Brief, page 52.) He contended that the only facts which it was permissible in this proceeding to have shown were such facts as may have occurred subsequently to the affirmation of the case by the Circuit Court of Appeals.

Thompson referred to pages 62, 74, 77, 79, 83, 86, 87, 92, 94, 97, 98, 119, 154, 162 and 168 of the transcript to show that the proceeding is all one proceeding and it was not until Bullock and others intervened that the form of the pleading as to its title was changed, referring to transcript pages 123, 153, 160, 174 and 195. He points out that at no time was the Board of Supervisors designated as a party to the proceeding until the petition for writ of error to the Court of Appeals was filed, and states that "thereupon counsel for plaintiffs in error took the liberty, without authority of law, or leave of Court, to designate the Board of Supervisors as a party. See Transcript, page 208.

It conclusively appears that there was no separate action against the Board of Supervisors.

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### SIXTH POINT: THE APPELLEES WERE AFFORDED DUE PROCESS.

It goes without saying, of course, that there is no lack of process insofar as El Camino Irrigation District is concerned.

Now the laws relating to irrigation districts impose upon certain officers certain duties. The officers upon whom duties are imposed are of course in the first instance the officers of the district itself and the board of directors is required by statute to levy assessments to satisfy not only its obligations but its bonds and the judgments against it as well.[7] Sections 26,500 and 26,501 of the Water Code also in effect create other officers of the district or imposes upon certain public officers certain duties in relation to the irrigation district. (See Appendix A.) By these provisions of the Water Code the Board of Supervisors and assessor in effect become officers of the irrigation district and are required to satisfy the liabilities based upon bonds and other contracts and the liabilities created by judgments. All of this is independent of the order of the Court itself.

We have shown that Rule 81 (b) of Federal Rules of Civil Procedure provide for the abolition of writs

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[7]Water Code, Section 25652, provides: "The annual assessment shall also include a levy sufficient to pay all of the following:

(d) All obligations of the district which have been reduced to judgment."

Section 25650 provides: "Each district by its board each year within 15 days after the close of its session as a board of equalization shall levy an annual assessment upon the land within the district in an amount sufficient to raise all of the following:

(a) Interest due or that will become due on all outstanding bonds of the district and interest which the board believes will become due on district bonds authorized but not sold, all respectively before the close of the next ensuing calendar year.

(b) Principal of all bonds of the district that have matured or that will mature before the close of the next ensuing calendar year.

To the extent that provision is otherwise made as permitted by law for the payment of bond principal and interest, levies for principal and interest pursuant to this section need not be made.

of mandate and that Section 69 of the rules also provides and directs that the process to enforce a judgment for payment of money shall be by writ of execution unless the Court directs otherwise. Thus it appears that this could be and probably should be by the judgment itself.

We submit we have shown that even a writ of mandate is mere process in substitution for a writ of execution.

That being the case no new suits and no new procedures were necessary. The judgment coupled with the order to show cause was sufficient process to advise the appellees of the demands of the appellant to bring them into Court and give them their "day in Court". The Court's order to show cause was in the alternative so to speak and contemplated that the Court would proceed to take steps to ensure the levy of the assessment. Instead the Court abruptly dismissed the entire proceeding.

The appellees appeared and *defended.* They raised defenses which only a party could raise:

(1) That the order of assessment was not asked for in the complaint.

(2) That the plaintiff had not pursued other available remedies.

(3) That the assessment would be inequitable.

(4) That it was too late to make the assessment when the judgments were served upon them.

They had their day in Court—one to which they were not entitled (*Thompson* case).

SEVENTH POINT: THE COURT ERRED IN NOT REGARDING ITS ORDER TO SHOW CAUSE AS PROCESS UNDER RULE 81 (b) OF FEDERAL RULES OF CIVIL PROCEDURE.

The judgment entered by the Court provided:

> "It is further ordered that the defendant El Camino Irrigation District make provision for the payment of this judgment by levying and collecting assessments against the lands in said irrigation district in the manner provided under the provisions of Division 11 of the Water Code of the State of California, and that upon the failure or refusal of the defendant and its officers to make such provision, that the Board of Supervisors and other officers of the County of Tehama, State of California, make provision for the payment of this judgment by levying and collecting assessments against the lands in said district in the manner provided by the said Division 11 of the Water Code of the State of California, and that for that purpose this Court retain jurisdiction of the cause and that the plaintiff may apply to the Court for such further relief as may be appropriate to obtain satisfaction of the judgment." (R. 7.)

Let it be remembered that no writ of execution can be levied against the property of an irrigation district. *El Camino Irrigation District v. El Camino Land Corporation,* 12 Cal. (2d) 378, 85 Pac. (2d) 123.

The Court itself had made an order providing that the Court would consider an appropriate order for the levy of an assessment, for the order to show cause was issued to show why "such further order in the premises should not be made as will insure the levy and

**collection of assessments for the satisfaction of the judgment herein."**

The Court should, if it was correct in dismissing the contempt proceedings, have construed the order to show cause as a proceeding under Rule 81 (b) of the Federal Rules of Civil Procedure and proceeded to require the levy of the assessment. This rule reads as follows:

> "The writs of scire facias and mandamus are abolished. Relief heretofore available by mandamus or scire facias may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules."

The Court's decision that it had no jurisdiction to proceed in the matter amounted to a declaration that the rule in question was unconstitutional as applied to the situation here.

Where the Court in any particular action between parties has obtained possession of property or has something between the parties which it has to carry out, it would seem that any party interested could be brought in by some form of notice without being made a party to the action and if such party has any interest in or legal objection it can raise its objection to the process.

The cases of *Morgenthau v. Barrett,* 108 Fed. (2d) 481, and *Levine v. Farley,* 107 Fed. (2d) 186, indicate that the Courts will grant some form of relief under this rule.

We urge that we have amply shown in our statement of the case above that all of the parties were

duly notified, not only of the entry of the judgment, but that demand was made for the levy of the assessment, and of course they were duly notified of the hearing on the order to show cause, and they appeared and set forth specific defenses on the grounds of equity, and the decision in the *El Camino* case, supra.

It would therefore appear that unless the relief sought in this case is granted the appellant will be denied the equal protection of the laws and the Courts for satisfaction and protection of its interests, that its property will be substantially taken from it without due process of law. Furthermore ample notice had been given to the appellees of the proceedings and we submit the Court should have entered an order requiring them to levy an assessment if it did not choose to hold them guilty of contempt. They had the same opportunity afforded the supervisors in the *Thompson* case to object or raise any defense even by intervention if proper. Quite obviously the purpose of the plaintiff and appellant is not to punish officials but to secure satisfaction of the judgment.

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## CONCLUSION.

It is respectfully submitted that the Court erred in dismissing the proceedings. In the first place it erred in dismissing the contempt proceedings and in the second place it erred in failing to make an alternative order requiring the officers of the district to make an immediate levy to satisfy plaintiff's judgment.

We ask this Court to reverse the order dismissing the proceedings and to direct the Court to overrule the defenses and require the supervisors and officers of Tehama County to proceed forthwith with an assessment, whether or not the contempt be sustained.

Dated, Turlock, California,
February 2, 1948.

Respectfully submitted,
W. COBURN COOK,
*Attorney for Appellant.*

**(Appendix A Follows.)**

# Appendix.

## Appendix A

*Water Code:*

Section 26500. If a board neglects or refuses in any year to levy assessments pursuant to this part, the board of supervisors of the office county shall, as provided in this article, perform the duties of the board of the district in respect to levying assessments in the same manner and with the same effect as if they were performed by the board.

Section 26501. The applicable part of the equalized county assessment rolls of the affected counties shall be the basis of assessment for the district when its assessments are levied pursuant to this article.

Section 26502. If any land subject to assessment for the purposes of the district does not appear upon a county assessment roll used as the basis of assessment for the district, the land omitted shall be forthwith assessed by the county assessor of the county in which it is situated upon an order of the board of supervisors making the assessment, and a description of the property omitted shall be written in the roll prepared for the district assessments.

Section 26503. The board of supervisors shall meet and equalize each assessment made pursuant to this article with the assessment of other land in the district. The same notice shall be given by the board of supervisors of a meeting for the purpose of equalizing the assessment to be made as herein directed as

is provided to be given by a district secretary when a board is to meet to equalize assessments.

Section 26504. All expenses incurred in levying the assessment shall be borne by the district concerned. Unless the expenses are paid within 60 days from the time when a demand for them is made, they shall be collected by an action commenced by the district attorney of the county whose board of supervisors prepared the assessment roll.

Section 26550. The district attorney of each office county shall ascertain each year whether the duties relating to the levying and collection of assessments in districts have been performed or not, and if he learns that the board or any official of any district has neglected or refused to perform any of these duties, he shall notify the board of supervisors or the county official required to perform the duty in the circumstances.

Section 26551. Unless the board of supervisors or county official proceeds to perform the duties he has been notified to perform within 30 days after the receipt of notice, the district attorney shall take action in court to compel performance.

Section 26552. The district attorney shall give notice to other officials and take any action necessary to secure the performance in their proper sequence of subsequent duties relating to the levying and collection of assessments.

Section 26553. For the enforcement of the levying and collection of any assessment required to be levied

and collected for the payment of any debt incurred, when complaint is made to the Attorney General that the district attorney of any county has not performed any duty devolving upon him by the provisions of this article or is not proceeding with due diligence or in the proper manner in the performance of the duty, the Attorney General shall make an investigation. If he finds the charge to be true, the Attorney General shall take any action necessary to enforce the performance of the duties relating to the levying and collection of assessments.